IN THE

Supreme Court of the United States

October Term, 1956 — No. 769

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, RICHARDSON DILWORTH, MAYOR OF THE CITY OF PHILADELPHIA, PHILADELPHIA COMMISSION ON HUMAN RELATIONS, WILLIAM ASHE FOUST and ROBERT FELDER, *Appellants*

v.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA, *Appellee*

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS THE APPEAL

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ARGUMENT

Appellants reply as follows to appellee's "Motion to Dismiss The Appeal And Brief In Opposition To Petition for Writ of Certiorari":

1. The constitutionality of the Act of June 30, 1869, P. L. 1276, was properly drawn into question in the state courts. Appellee's contrary contention (M.D. pp. 15-21)[1]

[1] "M.D." refers to appellee's motion to dismiss the appeal and brief in opposition to petition for writ of certiorari.

is patently incorrect. As stated in the jurisdictional statement, this question was squarely raised both before the Orphans' Court of Philadelphia County (J.S.[2] pp. 11-12) and on appeal in the Supreme Court of Pennsylvania (J.S. pp. 12-13) in the statement of questions involved. It should be noted that rule 35 of the Rules of the Supreme Court of Pennsylvania specifically provide that the issues considered by the Court are only those set forth in the statement of questions involved.

Further, on petition for reargument in the Supreme Court of Pennsylvania, the constitutionality of the Act of June 30, 1869, was once again raised.[3]

Appellants submit that it is impossible to raise the question in any clearer manner.

2. Appellee's contention that the decision of the Supreme Court of Pennsylvania rests upon a non-federal basis will not withstand analysis. It is true that there is language in the opinion of the court below indicating that even if appellee's refusal to admit appellants Foust and Felder to Girard College denied them their constitutional rights, the court would not order them admitted, but would merely appoint a private trustee (J.S. App. pp. 39-40). It is all

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[2] "J.S." refers to appellants' jurisdictional statement.

[3] The first point presented by appellants in their joint petition for reargument was as follows:

> "The opinion of the Court misconceived the question raised by all appellants and in particular, by the Commonwealth in its Statement of Questions Involved, to wit:
>
> > 'Does the Act of June 30, 1869, P. L. 1276, creating the Board of Directors of City Trusts violate the Fourteenth Amendment if it is construed to permit the Board to discriminate on the basis of race or color in the admission of students to Girard College?'"

too clear that this expression on the part of the court below was dictum in no way pertinent to that court's holding, for the significant fact remains that the court below did not remove the City of Philadelphia as trustee. Indeed, the court gave judicial approval to the continued operation of Girard College by City Officials in a manner which excluded appellants Foust and Felder and other qualified Negro boys.

We reassert the argument advanced in our jurisdictional statement (pp. 21-22) and add only that appellee's argument is the same as that advanced in *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, and *Sipuel v. Board of Regents*, 332 U. S. 631. In each case, the state argued that the Negro appellant would not obtain the relief sought—admission to law school—if the state abolished all state law schools as it had the constitutional right to do. This Court held that so long as the state offered educational opportunities to white students, it had to offer the same opportunities to Negroes at the same time and under the same conditions.

Within the last several months, the same question was before the United States Court of Appeals for the Fifth Circuit in a case involving a municipal beach and swimming pool. *City of St. Petersburg v. Alsup*, 238 F. 2d 830 (5th, 1956), petition for cert. filed February 8, 1957, October Term, 1956, No. 757. In response to the contention that a court order enjoining segregation would force the municipality to close the pool, the Court of Appeals stated: (p. 832)

> "It is no answer to say that the beach and pool cannot be operated at a profit on a nonsegregated basis, and that the City will be forced to close the pool.

Of course, financial loss cannot justify illegal operation; and, unfortunate as closing the pool may be, that furnishes no grounds for abridging the rights of the appellees to its use without discrimination on the ground of race *so long as it is operated.*" (Emphasis added.)

In this appeal, appellants Foust and Felder similarly request admission to Girard College so long as the City of Philadelphia continues to administer it. And we submit that a state court cannot foreclose review of the substantial constitutional issues presented by stating that it might substitute a private trustee for the City, even while it does not do so.

We acknowledge that the constitutional issue would be significantly different if the City no longer administered the College. Still involved, nevertheless, in this appeal, would be the constitutional issue raised by Points 2 and 3 of the jurisdictional statement, to wit: whether the other state activity is such that the Fourteenth Amendment is applicable to Girard College even if the City of Philadelphia no longer administered the College. Moreover, if the court below ordered the removal of the trustee, there would be a new constitutional issue raised, to wit: whether the action of the Pennsylvania courts in substituting trustees for the sole purpose of precluding the admission of Negroes in and of itself violated the Fourteenth Amendment.

3. The suggestion of mootness of the appeal of appellant Foust, even if correct, (M.D. p. 6 fn. 4) in no way affects the jurisdiction of this Court. Appellant Felder is not yet ten years old. Furthermore, the Commonwealth of Pennsylvania as *parens patriae* (R. 121a) raises the ques-

tion of the illegal and unconstitutional administration of the trust for the benefit of all its citizens[4] and its standing has never been questioned. The standing of the Commonwealth is in no way dependent upon the eligibility of any individual. Indeed, under the law of Pennsylvania, it is the duty of the Attorney General on behalf of the public to enforce charitable trusts. *Wiegand v. The Barnes Foundation*, 374 Pa. 149, 97 A. 2d 81 (1953); *Abel v. Girard Trust Company*, 365 Pa. 34, 73 A. 2d 682 (1950).

Moreover, we firmly reject the assertion that the appeal is moot as to Foust. In fact, this in itself raises an additional substantial federal question. The Will permits admission to the College for those between the ages of 6 and 10, but once admitted they are entitled to stay there until they are 21 years old. Foust applied for admission when he was 7, but the time-consuming process of litigation has brought him beyond his tenth birthday. This ought not to deprive him of the enjoyment of the educational opportunities at the College until he is 21 years old—a privilege to which he would have been entitled had he not been deprived of his constitutional right.

It is too clear for argument that this case is completely different from the one in which a person applies for admission to high school and completes high school before his constitutional rights have been adjudicated. In such a case, the decree of this Court cannot give him any part of his high school education on a non-segregated basis. Here, however, this Court's decree can give Foust approximately 11 years of the benefits of Girard College.

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[4] See *Georgia v. Pennsylvania R. Company*, 324 U. S. 439, 447, where this Court, in allowing an action by the State of Georgia as parens patriae under the anti-trust laws, stated that "[s]uits by a State parens patriae have long been recognized."

In disposing of cases before it, this Court will always make such disposition as justice may require. *Ashcraft v. Tennessee*, 322 U. S. 143, 156; *Patterson v. Alabama*, 294 U. S. 600, 607. In considering the appeal of appellant Foust, justice and equity require application of the time-honored principle that equity regards as done what ought to have been done. Accordingly, for this purpose, appellant Foust should be deemed to have been admitted to Girard College as of the date of the denial of his application.

4. Appellee's attempt to minimize the crucial importance of the succession of implementing statutes and ordinances is misleading. (For a statement of these enactments, see J. S. pp. 6-10, App. pp. 112-123). Indeed, this Court in *Vidal v. Girard's Executors*, 2 How. 127, 110-191, recognized in clearest language the significance of the implementing Acts of March 24, 1832, P. L. 176 and April 4, 1832, P. L. 275. This Court held that the Act of March 24, 1832, in particular constituted "a full recognition of the validity of the devise for the erection of the college" and that both of the above statutes conferred "positive authority . . . upon the City authorities to act upon the trusts under the Will and to administer the same. . . ." Finally, the opinion of Mr. Justice Story refers to these statutes as of the "highest importance and potency."[5]

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[5] The pertinent portion of this Court's opinion in the *Vidal* case is as follows:

"But what is more direct to the present purpose, because it imports a full recognition of the validity of the devise for the erection of college, is the provision of the 11th section of the [Act of March 24, 1832, P. L. 176] which declares 'That no road or street shall be laid out, or passed through the land in the County of Philadelphia, bequeathed by the late Stephen Girard for the erection of a college, unless the same shall be recommended by the trustees or directors

Whether the gift for the College and the competency of the City to act as trustee may have been upheld even in the absence of the above implementing legislation is an academic question of no real pertinence here. The critical fact is that there was genuine doubt on these questions and the Legislature accordingly acted twice to confer authority upon the City.

The Act of February 27, 1847, P. L. 178, and the supplementing Act of April 20, 1853, P. L. 624, further dramatically illustrate how the sovereign power of the state was invoked to bring to fruition the private testamentary scheme. These acts are special statutes enacted to implement the Will. Indeed, the Act of February 27, 1847, is entitled "An Act Relative to the Girard College for Orphans" (J.S. App. p. 116). By this statute, the law relating to the indenturing of orphan children was altered. The Act changed the ages for indenturing to comply with those fixed in Girard's Will. It provides for the expiration of

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of the said College, and approved by a majority of the select and common councils of the city of Philadelphia.' The [Act of April 4, 1832, P. L. 275] is also full and direct to the same purpose, and provides, 'That the select and common councils of the city of Philadelphia, shall be, and they are hereby authorized to provide, by ordinance or otherwise, for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard.' *Here, then, there is a positive authority conferred upon the city authorities to act upon the trusts under the will, and to administer the same through the instrumentality of agents appointed by them.* No doubt can then be entertained, that the Legislature meant to affirm the entire validity of those trusts, and the entire competency of the corporation to take and hold the property devised upon the trusts named in the will . . . the *recognition and confirmation of the devises and trusts of the will by the Legislature, are of the highest importance and potency.*" (Emphasis supplied)

the indenture if before attaining the age of fourteen, the child is expelled from the College because of misconduct. In fact, there are several provisions requiring action to be taken "according to the Will of [Stephen Girard]," thus incorporating by reference provisions of the Will into the statute. Thus, the most intimate rights of guardianship and indenture of minors are prescribed by state statute only for the students at Girard College and in terms complying with the requirements of the Will.

Appellees assert that "Girard did not stipulate that any such legislation be enacted" (M.D. p. 11). While he did not stipulate that such legislation be enacted in express terms, he provided this in effect in Article XXI, paragraph 5, of his Will which prohibits the admission of any orphan until such a law came into existence (R. 36a-37a).

Appellee's argument basically is that its action is not really action of government because it "has no choice but to follow the directions in the will" (M.D. pp. 21-22). Hence it compares the innumerable ordinances adopted by the Philadelphia City Councils as merely internal regulations comparable to the corporate acts of a private corporate trustee (M.D. pp. 10-12, 21-24). It is noticeable, however, that those who make this argument shrink from saying the same thing regarding state statutes. When they come to deal with the state statutes implementing Girard's Will they do not assert that these too are merely internal acts in aid of the municipal trustee's performance of its duties.

But the real vice of the argument is the same, whether it be an ordinance of a city or a statute of a state that is involved. The private trust company's resolutions affect only the corporation, for it is not a governing body. Unlike

a private corporate trustee, the acts of governmental bodies affect all its citizens. Accordingly, when the City of Philadelphia acts by ordinance or the Commonwealth of Pennsylvania acts by statute, each is exercising the highest power of a sovereign.

The implementing statutes of the Pennsylvania Legislature conferring authority upon the City to administer the trusts and changing the law with regard to the indenturing of orphans, as well as the numerous ordinances of the Philadelphia City Councils, are acts of the sovereign. They are not acts of a private trustee. They are not corporate resolutions authorizing officers of a private trustee to act. And the evil of appellee's argument is that it would stamp such legislative action as purely private and would ascribe vitality to it as coming not from the power of the state but from the will of a private testator.

Accordingly, appellee's argument confirms our view that there can be no justification for carving out the government's fiduciary activity from the scope of the Fourteenth Amendment. What it does as fiduciary is inextricably entwined with its capacity as a law-making power. This very fact forbids its being treated as a private fiduciary which has no law-making power and which cannot make laws in aid of its testator's wishes.

It is here, too, that the inadequacy of appellee's major position becomes clear. It argues that no state statute is involved because the statute merely authorizes the city to act as directed by the testator. But, if the legislature could not authorize its officials to act in violation of the Fourteenth Amendment, how can it establish their offices and then assert that they may act in violation of the Fourteenth Amendment whenever private testators so wish? How can

a state officer justify his act because a private testator ordered it, if the same act ordered by his master, the state, would not be excused?

It is significant that appellee cannot find cases running its way. Instead, it relies upon cases which do not involve state officials, but private persons whose acts are such that the prohibitions of the Fourteenth Amendment are sought to be applied to them. Typical of this is its citation of *Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d 541 (1949), cert. den. 339 U. S. 981, where a private corporation was allowed to discriminate against Negroes in its choice of tenants despite the fact that various forms of state aid had implemented the establishment of the housing project. The *Stuyvesant Town case* is clearly distinguishable in that the discriminatory acts there were performed by employees and officers of a private corporation.

An argument very similar to that of appellee was recently made in the Court of Appeals for the Fifth Circuit. In *City of St. Petersburg v. Alsup*, supra, the city asserted the position that since under state law it operated its municipal beach and swimming pool in a proprietary capacity, the limitations of the Fourteenth Amendment were not applicable. The city argued it was its right and duty to operate these facilities as would a private utility for the best financial result, which could only be achieved if Negroes were excluded. The court rejected this argument and pointed out, relying on this Court's opinion in *City of Trenton v. State of New Jersey*, 262 U. S. 182, 191-192, that the category of "proprietary" activity of government had been created by the judiciary to mitigate the harshness of the sovereign immunity from tort liability. Such

a doctrine, created for such a purpose, could not be distorted to do injustice by creating immunity from the Fourteenth Amendment. The Court of Appeals stated: (p. 832)

> "A state cannot, by judicial decision or otherwise, remove any of its activities from the inhibitions of the Fourteenth Amendment. See *Nixon v. Condon*, 286 U. S. 73, 88, 52 S. Ct. 484, 76 L. Ed. 984. It is doubtful whether a municipality [3] may ever engage in purely private action that would not be action of the state. See *In re Civil Rights Cases*, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835; *Buchanan v. Warley*, 245 U. S. 60, 38 S. Ct. 16, 6 L. Ed. 149."

Footnote 3 of the opinion states:

"Except possibly in some fiduciary capacity. See Estate of Girard, Pa., 127 A. 2d 387."

It is submitted that there is no greater justification for exempting fiduciary functions from the Fourteenth Amendment than there is for exempting proprietary functions. Accordingly, the decision below, if allowed to stand, can lead logically to a still further narrowing of the Fourteenth Amendment. The federal questions presented here will thus have a vital impact on the future judicial interpretation of the Fourteenth Amendment by state courts and the lower federal courts.

Finally, appellee has pushed too hard its assertion that there is no state action because only private money has been used. In the first place, this assertion is not completely accurate. Unlike a private trustee, the City has received no trustee's commissions on income and capital gains. Since 1869 the trust estate has received the gratui-

tous services of fourteen public officials constituting the Board of Directors of City Trusts, including the Mayor and the President of City Council, as well as the gratuitous services of the City Treasurer and the City Controller. And in the period prior to 1869, the estate had the benefit of the members of the City Councils as well as numerous other city officers.

Moreover, and even more important, money is not the exclusive test. Appellee loses sight of the fact that unlike the *Stuyvesant Town* case it is not a private person who speaks to the applicants, but an official of their government. The fact that a private testator provided the original capital fund is irrelevant to the question whether citizens may be discriminated against by the officers of their own government and be told that they have no right to complain because the discrimination is practiced at the behest of a private citizen whose wishes are to be made supreme over the government. This, we submit, is to lose sight of the human values which lie behind the great liberating command of the Fourteenth Amendment.

WHEREFORE, appellants urge this Court to deny the motion to dismiss the appeal.

Respectfully submitted,

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